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No. 09-61

Supreme Court, U.S.
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In The
Supreme Court of the United States

LINCOLN MEYERS,

Petitioner,

v.

SOVEREIGN BANK; WEIR & PARTNERS, LLP; LAURA J. O'NEILL, ESQUIRE; COZEN O'CONNOR and CATHI SNYDER, ESQUIRE,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the grant of summary judgment by the trial court denied Petitioner's Seventh Amendment right to a jury trial, where (1) Petitioner appealed to an appellate court, which affirmed that summary judgment was properly granted, (2) Petitioner did not raise a federal constitutional issue until the filing of this Petition, and (3) Petitioner has not identified in his Petition a place in the record where he allegedly raised such an issue previously.

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STATEMENT OF THE CASE

Petitioner, Lincoln Meyers ("Petitioner"), commenced this action by complaint filed in the Philadelphia Court of Common Pleas on April 7, 2005, which named as defendants Cozen O'Connor ("Cozen") and Cathi Snyder ("Snyder"), an attorney at Cozen, as well as Sovereign Bancorp, Inc. t/a Sovereign Bank ("Sovereign Bank"), the law firm of Weir & Partners, LLP (the "Weir firm"), and Laura J. O'Neill, an attorney with the Weir firm. The claims in the complaint arose from Cozen's representation of Petitioner's mother, Lillian Meyers, in a lawsuit she had filed against him.[1]

Petitioner alleged that Cozen, through Snyder, had defamed him in a March 8, 2004 telephone conversation with Walter Weir, and in an October 1, 2004 telephone conversation Snyder allegedly had with Floyd Reaves, gambling credit manager at the Trump Taj Mahal casino in Atlantic City, New Jersey. Specifically, Petitioner alleged that Snyder told Weir that Petitioner had fraudulently used a power of attorney he held for his mother to sell a car, purchased in his mother's name and using her funds, which was also the collateral for a loan made by

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[1] *See Meyers v. Meyers*, 27 Fid. Rep. 2d 239 (Pa. Orphans' Ct. Montg. Cty. 2007). After trial, Petitioner's mother ultimately prevailed in part on her claims against Petitioner. *Id.* at 254. Specifically, the Orphans' Court directed Petitioner to re-convey two properties and more than $10,000, which Petitioner wrongfully obtained. *Id.*

Sovereign Bank to Petitioner's mother. Petitioner also contended that Snyder had somehow defamed him to Reaves, causing Reaves to cancel Petitioner's gambling line of credit at the Taj Mahal casino. Petitioner further alleged that Snyder and Cozen made defamatory communications about him to Sovereign Bank and Pennsylvania Business Bank that tortiously interfered with his prospective commercial advantages with those financial institutions, leading Sovereign Bank to commence legal action to collect Petitioner's admittedly defaulted personal loans and causing Pennsylvania Business Bank to decline to give him credit for a proposed real estate transaction he was contemplating.

After discovery had been completed, all parties (including Petitioner) filed motions for summary judgment. Contrary to Petitioner's contentions, the undisputed evidence on the summary judgment record showed the following:

1. Snyder and Weir, the only two parties to the March 8, 2004 conversation, confirmed that Snyder simply said that Petitioner had sold the car in Florida, which was true. Snyder never told Weir that Meyers had "fraudulently" sold his mother's Rolls Royce in Florida "by the use of a counterfeit title."

2. The two other people who Snyder allegedly called were Floyd Reaves, an executive at the Trump Taj Mahal casino, and Alan Fellheimer, President of Pennsylvania Business Bank. Reaves denied that he ever spoke with Snyder or anyone from Cozen, and

confirmed that he briefly withdrew Meyers' gambling line of credit based entirely on a credit report he received showing that Meyers had serious credit problems. Fellheimer testified that he had a brief telephone conversation with an unnamed woman lawyer from Cozen, and that he received a copy of the Lillian Meyers complaint against Lincoln Meyers from that woman, but adamantly denied that the woman said anything defamatory about Meyers or that his bank refused to make a loan to Meyers based on that conversation. There was simply no evidence to support any allegation that Snyder made calls to several of [Meyers'] business associates resulting in the cancellation of pending deals and the withdrawal of credit.

3. Thomas Young, of Sovereign Bank, called Snyder to find out about the Rolls Royce, which was Sovereign's collateral for its loan to Cozen's client, Lillian Meyers. Snyder merely said that the loan payments were current, that Mrs. Meyers' complaint stated that Petitioner had taken the car to Florida where he traded it in for two cars and some cash, and that Young could get a copy of the complaint from the court clerk's office.

On March 29, 2007, the Court of Common Pleas, by the Honorable Matthew D. Carrafiello, granted the respective summary judgment motions filed by Cozen and Snyder, and by Sovereign, the Weir firm, and

O'Neill.[2] While the alleged communications by Snyder and Cozen were protected by the judicial privilege doctrine, App. 17-18, the Court found that Petitioner had failed to present any "evidence to support the allegation that any attorney at Cozen made defamatory remarks" about him, and that there was no "evidence to support the contention that persons or entities contacted by Cozen subsequently made decisions adverse to [Petitioner's] interests based on the firm's contacts." App. 14. The Court held that Snyder and Cozen "occasioned [Meyers] no damage and have only disseminated the truth to those who had a privilege to receive it." App. 17-18, 20. It pointedly confirmed that Petitioner's "dishonest practices" and his own failure to pay his creditors caused the damage to his credit and his ability to secure future loans. App. 16. Finding that Petitioner presented no admissible evidence to support his claims and thus could not substantiate them either factually or legally, the trial court dismissed all of Petitioner's claims against all defendants.

The trial court also denied Petitioner's own motion for summary judgment. In doing so, the trial court expressed dismay at Petitioner's behavior:

> The undisputed conduct of appellant in this matter should be embarrassing to him. It is

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[2] Once appeal had been taken by Petitioner, the Court issued its explanatory opinion. In that opinion, quoted from herein, the Court refers to Petitioner as "appellant."

> understandable that appellant should feel aggrieved at any recounting of these sordid details. As a son, a fiduciary and an attorney, he has violated trusts and has alone generated a reputation for despicable behavior. As if that were not enough, he now attempts to seek "damages" from those who were taking appropriate steps to recoup the losses he caused. This cannot be permitted as appellees have occasioned him no damage and have only disseminated the truth to those who had a privilege to receive it.

App. 20.

The Superior Court of Pennsylvania affirmed in full the trial court's reasoning and rulings, and denied Petitioner's motion for re-argument or reconsideration. Petitioner then filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied on February 13, 2009.

No federal constitutional issue was ever raised in the trial court, the Superior Court, or in the petition for allowance of appeal to the Supreme Court of Pennsylvania.[3]

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[3] In his petition for allowance of appeal, Petitioner for the first time raised an issue under the *Pennsylvania* Constitution, *not* the federal constitution. The state constitutional issue did not involve the claimed loss of a right to jury trial.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE, EVEN IF PETITIONER WERE PERMITTED TO BE HEARD, IT IS SETTLED LAW THAT THE GRANT OF SUMMARY JUDGMENT IS CONSISTENT WITH THE PROTECTION OF SEVENTH AMENDMENT RIGHTS.

A. Any Seventh Amendment Claim Was Waived By The Failure Of Petitioner To Raise The Issue Prior To The Petition.

Petitioner asserts in his Petition a federal constitutional issue never before raised, seeking review on the basis that his right to a trial by jury under the Seventh Amendment of the Constitution of the United States was denied by the Supreme Court of Pennsylvania, which denied him review of the orders of the lower courts that had granted, and affirmed, summary judgment. Petitioner failed to present this argument previously. It is therefore waived and cannot be raised before this Court.

Failure to raise the relevant federal question in state court will preclude this Court from reviewing the state court's judgment. As the Court explained in 1927:

> It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and

> expressly or necessarily decided by such state court.

Mellon v. O'Neil, 275 U.S. 212, 214 (1927). This long established principle is codified at 28 U.S.C. § 1257(a) (2006):

> State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

When the highest state court does not address the federal issue raised in the petition for certiorari, the Court "assume[s] that the issue was not properly presented and the aggrieved party bears the burden of defeating this assumption." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

The Petition itself makes no claim that Petitioner's Seventh Amendment right to a jury trial was ever raised before. To the contrary, in formulating his argument in terms of the Pennsylvania

Supreme Court's alleged denial of his right on his petition for allowance of appeal, Petitioner effectively concedes that the issue was never raised in any lower court.

In addition, contrary to Supreme Court Rule 14.1(g),[4] the Petition does not specify the stage of the proceedings where the federal constitutional issue was raised, the method or manner of raising it, or the way the issue was passed on by the lower courts. Nor does the Petition quote from, or otherwise refer to, the place in the record where the issue was raised. Not only was the Seventh Amendment issue never timely and properly raised, the departure from Rule 14.1(g) makes conclusive the inability of Petitioner to seek review on his federal constitutional claim.

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[4] Rule 14.1(g) addresses the contents of a petition for writ of certiorari, and provides in pertinent part:

> (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

B. Further Review Of The Seventh Amendment Issue Is Inappropriate.

1. It is Settled Law That Summary Judgment Is Compatible With Seventh Amendment.

Even were the issued not waived, the decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Pa. R. C. P. 1035 governs summary judgment in Pennsylvania. The operative language of that rule is modeled on, and is substantively the same as, Fed. R. Civ. P. 56. It permits summary judgment where the non-moving party fails to adduce of record a genuine issue of material fact. *Compare* Pa. R. C. P. 1035.3,

> (a) Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleading but must file a response within thirty days after service of the motion identifying
>
> (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
>
> (2) evidence in the record establishing the facts essential to the cause of action or

> defense which the motion cites as not having been produced.

with Fed. R. Civ. P. 56(c):

> The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

This Court has long held that the exercise of summary judgment does not *per se* violate one's right to jury trial. *See Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). "Summary judgment does not violate a party's Seventh Amendment jury trial rights so long as the person having the right to the jury trial is an actual participant in the summary judgment proceeding." *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999); *Shannon v. Graves*, 257 F.3d 1164, 1167 (10th Cir. 2001) ("The Seventh Amendment is not violated by proper entry of summary judgment, because such a ruling means that no triable issue exists to be submitted to a jury."); *City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641, 657 (10th Cir. 1992) ("[S]ummary judgment, applied properly, does not violate the Seventh Amendment."), *overruled on other grounds by Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997); *see*

also Fidelity & Deposit Co. v. United States ex rel. Smoot, 187 U.S. 315, 319-21, 23 S.Ct. 120, 47 L.Ed. 194 (1902). The right to a jury trial exists only when there is some genuine issue of material fact to be determined. *Shingara v. Miller*, 2007 WL 570080, at *4 (M.D. Pa. Feb. 15, 2007) (finding that Seventh Amendment issues were mooted where the lower court determined that no genuine issues of material fact existed and entered judgment in favor of defendants).

As the editors of James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 1977) state:

> Since the Supreme Court's 1986 *Liberty Lobby* decision, which equated the standard for summary judgment with the standard for judgment as a matter of law, Seventh Amendment arguments against summary judgment have become less compelling. If judgment as a matter of law, which permits ruling against a non-movant who fails to produce substantial evidence sufficient to require a jury trial, is constitutional, summary judgment based on the same criteria must also be constitutional. . . . Withstanding a properly made summary judgment motion requires production of substantial evidence. If the non-movant offers insufficient evidence to support its claim, the court may grant summary judgment without offending the Seventh Amendment, just as it may grant judgment as a matter of law without offending the Seventh Amendment. Because the primary

> difference between summary judgment and judgment as a matter of law today is timing and the nature of the proofs, the constitutional inquiry is the same for both motions.

11 *Moore's Federal Practice*, §56.13.

Clearly, this Court has held that the procedural device of summary judgment comports with the Seventh Amendment. There exists no basis for further review of this settled legal issue.

2. Petitioner Complains Merely Of An Erroneous Outcome Under Settled Law.

With the underlying federal constitutional principle settled, Petitioner merely presents a question of an alleged erroneous outcome under a constitutionally compliant procedure. Petitioner does not satisfy the criteria for review.

Supreme Court Rule 10 establishes three categories of decisions that the Court will consider for review: conflict among circuit courts, conflict among state supreme courts, or important questions of federal law requiring decision.[5] Rule 10 further

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[5] In describing the character of the third reason for granting review, Rule 10(c) states:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

explains that the Court rarely grants review "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner meets none of these categories. He presents nothing more than an "asserted error" of "erroneous factual findings or the misapplication of a properly stated rule of law." Further review is not warranted.

CONCLUSION

Review should not be granted because this case presents no novel legal issue, no conflict with existing precedent, and no departure from accepted judicial standards. There is nothing remarkable in the trial court's application of the summary judgment procedure to the undisputed facts presented, or in the subsequent affirmance of that ruling. The only thing remarkable is Petitioner's persistence in pressing an action that the trial court found "should never have been brought in the first place."

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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